

**Exhibit A**  
to  
**Agreement for Licensing and Acquisition  
of Proprietary Rights, Interests and Property**

Pursuant to the Agreement for Licensing and Acquisition of Proprietary Rights, Interests and Property entered into as of August 20, 2001 by and between Raybern Foods, Inc. and Rose & Shore, Inc., the following costing formulas shall be used to determine Product Costs for the Products as such costing formulas shall be adjusted from time-to-time pursuant to the terms of the Agreement:

<b>Product:</b>	Togo's Whole Pastrami		
<b>Raw Material Cost Index:</b>	USDA Carlot Beef - FOB Omaha Basis Boneless Processing Beef/Beef Trimmings Average of Daily Weighted Average of 65% lean fresh trimmings plus \$.80 per pound		
<b>Average Product Yield:</b> (Blood and Cook Loss)	97.0%		
<b>Seasoning Costs:</b>	\$ .068 per pound consisting of:		
	Brine into product:		\$ .0263
	Brine to cover and Waste:		\$ .0100
	Rub (\$1.20/lb. x 2.4% usage and 10% waste):		\$ .0317
<b>Packaging Costs:</b>	\$ .059 per pound consisting of:		
	Bag:		
	(\$ .2439 each-average product weight is 6.5 lbs, plus 10% waste)		\$ .0413
	Box:		
	(\$ .4714 each + \$.02-label + \$.03-weight sticker, avg 30lb box)		\$ .0174
<b>Other Manufacturing Costs:</b>	\$ .035 per pound		
	Utilities:		\$ .0300
	Cleaning Supplies		\$ .0050
<b>Direct Labor:</b>	\$ .123 per pound		
<b>Freight and Allowances:</b>	\$ .035 per pound		
<b>Product Cost Per Lb. = <math>\frac{\text{Raw Materials Cost} + \text{Seasoning} + \text{Packaging} + \text{Other} + \text{Freight and Returns} + \text{Labor}}{\text{Avg Product Yield}}</math></b>			
<b>Initial Product Cost = <math>\\$1.58/.97 + .068 + .059 + .035 + .123 + .035 = \\$1.949</math> per pound</b>			

**Product:** Togo's Roast Beef

**Raw Material Cost Index:** USDA Central US Cow Cuts and Boneless Processing Items FOB Omaha or equivalent basis for the Midwest & FOB Plant for TX & OK  
Utility Items - Inside Round Cap Off  
Average of the daily low price listed for the Latest Established Market

**Average Product Yield:** 97.0%

**Seasoning Costs:** \$.037 per pound  
Injection: \$.0120  
Rub: \$.0250  
(\$1.00/lb x 2.5% usage)

**Packaging Costs:** \$.061 per pound  
Netting:  
(\$1.19 each x 13 lb avg. pc.) \$.0146  
Packaging:  
(\$1.3584 each—  
avg weight is 13 lb plus 10% waste) \$.0303  
Box  
[\$1.40 each + \$.02 (label) + \$.03 (weight sticker)  
avg. 28lb box] \$.0161

**Other Manufacturing Costs:** \$.035 per pound  
Utilities: \$.03  
Cleaning Supply: \$.005

**Direct Labor:** \$.131 per pound

**Freight and Allowances:** \$.035 per pound

Product Cost Per Lb. =  $\frac{\text{Raw Materials Cost} + \text{Seasoning} + \text{Packaging} + \text{Other} + \text{Freight and Returns} + \text{Labor}}{\text{Avg Product Yield}}$

Initial Product Cost =  $\$1.74/.97 + .037 + .061 + .035 + .131 + .035 = \$2.093$  per pound

**Product:** Togo's Humus

**Raw Materials:**

Garbanzo Beans  
(\$12.75/cs—26lb net weight)  
\$.49/lb x 77.58% = \$.3804

Paste (several raw materials)  
\$.995/lb x 13.50% = \$.1347

Spices (blended)  
\$.81/lb x 8.92% = \$.0725

**Average Product Yield:** 96.5%

**Packaging Costs:** \$.05 per pound

**Other Manufacturing Costs:** \$.035 per pound

**Direct Labor:** \$.135 per pound

**Freight and Allowances:** \$.035 per pound

**Product Cost Per Lb. =  $\frac{\text{Raw Materials Cost}}{\text{Avg Product Yield}} + \text{Seasoning} + \text{Packaging} + \text{Other} + \text{Freight and Returns} + \text{Labor}$**

**Initial Product Cost =  $\$0.588 / .965 + .05 + .035 + .135 + .035 = \$0.86$  per pound**

**EXHIBIT "B"**

**GRANT OF LICENSE**

RAYBERN FOODS, INC., a California corporation, ("Licensor") hereby grants to ROSE & SHORE, INC., a California corporation, ("Licensee") an exclusive non-transferable license to process and sell pastrami, roast beef and humus to the chain of fast food restaurant franchises, commonly known or referred to as "Togo's Eateries" or "Togo's Famous Sandwiches as of the date of execution of this Grant, on all terms and conditions as are specified in that certain document styled "Agreement for Licensing and Acquisition of Proprietary Rights, Interests and Property" ("Contract") executed by and between Licensor and Licensee as of August 20, 2001. The Contract is incorporated herein by this reference.

RAYBERN FOODS, INC.

By: \_\_\_\_\_  
Bernard J. Viggiano, President

Dated: \_\_\_\_\_

54'

LAW OFFICES OF KYRA A. SUBBOTIN  
KYRA A. SUBBOTIN State Bar No. 104944  
2625 Alcatraz Avenue, No. 152  
Berkeley, CA 94705  
Telephone: (510) 923-0451  
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Attorney for Defendants Raybern Foods, Inc.  
and Bernard J. Viggiano

**FILED BY FAX**  
**ALAMEDA COUNTY**

March 23, 2005

CLERK OF  
THE SUPERIOR COURT  
By Rosanne Case, Deputy

CASE NUMBER:  
RG04141329

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

TRI COMMERCIAL REAL ESTATE  
SERVICES, INC.,

Plaintiff,

vs.

RAYBERN FOODS, INC., BERNARD  
J. VIGGIANO, and DOES 1-20

Defendants.

Case No. RG 04141329

**CROSS-COMPLAINT AGAINST TRI  
COMMERCIAL REAL ESTATE  
SERVICES, INC., JOHN FULTS,  
AND ROBERT L. YOUNG,  
INDIVIDUALLY AND DBA LAW  
OFFICES OF ROBERT L. YOUNG**

Trial Date: July 22, 2005

RAYBERN FOODS, INC.,

Cross-complainant,

vs.

TRI COMMERCIAL REAL ESTATE  
SERVICES, INC., JOHN FULTS,  
ROBERT L. YOUNG, individually and  
dba LAW OFFICES OF ROBERT  
YOUNG

Cross-defendants.

Cross-complainant Raybern Foods, Inc. (Raybern) alleges as follows:

**GENERAL ALLEGATIONS**

1. TRI Commercial Real Estate Services, Inc. (TRI) is and at all relevant

41461.1

1 times was a California corporation that had its principal place of business in San  
2 Francisco and is the plaintiff in this action.

3 2. John Fults is and at all relevant times was a licensed real estate agent  
4 and independent contractor affiliated with TRI. At all relevant times, Fults held  
5 himself out as president of Keystone Financial, a different corporation than TRI  
6 and one for which Fults served as president. Fults held himself out to Raybern as  
7 someone with superior financial knowledge and abilities and significant experience  
8 in handling the type of transactions that form the basis of this lawsuit.

9 3. Cross-complainant is informed and believes and thereon alleges that  
10 Robert L. Young was at all relevant times an officer and director of TRI and, with  
11 respect to certain actions alleged herein, acted as its agent and within the course  
12 and scope of his obligations as an officer and director of TRI. Raybern is further  
13 informed and believes that Robert L. Young was at all times a member of the  
14 California bar and a practicing attorney holding himself out as having expertise in  
15 the type of transactions that form the basis of this lawsuit.

16 4. Cross-complainant is informed and believes and thereon alleges that  
17 Robert L. Young, a California lawyer, was the owner and sole proprietor of the Law  
18 Offices of Robert L. Young, a professional corporation at various times relevant  
19 herein. Young and the Law Offices of Robert L. Young provided advice and  
20 services to Raybern in connection with the transactions between Raybern and Rose  
21 & Shore.

22 5. The acts set forth herein occurred within the jurisdiction of this Court and  
23 are related to and part of the series of transactions forming the basis of the TRI's  
24 complaint.

25  
26 **FIRST CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY**

27 (Against Robert Young, Fults, and TRI)

28 6. In early 2001, Raybern retained TRI, through its purported agent, John

1 Fults, to represent Raybern in connection with negotiations toward the formation of  
2 a strategic business alliance with another entity, Rose & Shore. In that capacity  
3 Fults and TRI were acting as fiduciaries to Raybern and owed Raybern the highest  
4 duty of honesty and loyalty. At the time Raybern retained TRI, it did not know of  
5 or understand the true relationship between Young and TRI or between Fults and  
6 TRI, and the cross-defendants did not disclose said relationships to Raybern.

7 7. TRI, through its purported agent Fults, then undertook to have Raybern  
8 hire Young to perform services of a legal and/or business nature for Raybern.

9 8. Raybern hired Young and the Law Offices of Robert L. Young on or about  
10 May 10, 2001, at TRI and Fults's recommendation. At the time Raybern hired  
11 Young and commenced payment for his services, Raybern did not know that Young  
12 was, in fact, an officer and/or director of TRI. Neither TRI, nor Fults, nor Young  
13 disclosed that fact, and none of them disclosed that Fults had a prior and ongoing  
14 personal and/or professional relationship with Young.

15 9. The services performed by TRI by and through Young, its officer and  
16 director, resulted in the consummation of a transaction upon which TRI now is  
17 seeking damages. The services that Young provided included legal services as well  
18 as services which TRI/Fults had already agreed to provide Raybern in exchange for  
19 a commission from the Raybern/Rose & Shore transactions. Raybern was billed for  
20 and paid Young substantial fees for his services.

21 10. During the course of his representation of Raybern, Young failed to  
22 adequately protect Raybern's financial interests in the transactions with Rose &  
23 Shore and likewise failed to adequately protect Raybern when TRI's purported  
24 agent, John Fults, announced that he intended to withdraw from further  
25 representation of Raybern.

26 11. Young, Fults, and TRI's actions breached their respective fiduciary  
27 duties to Raybern, resulting in damages to Raybern in an amount to be proven at  
28 trial.

**SECOND CAUSE OF ACTION - PROFESSIONAL NEGLIGENCE**

(Robert Young/Law Offices of Robert L. Young)

12. Cross-complainant realleges paragraphs 1 through 10 as though fully set forth herein.

13. Young's services on behalf of Raybern fell below the standard of care for legal professionals in that he failed to adequately disclose his relationship with TRI and likewise failed to protect his client's interests vis a vis TRI when TRI's agent withdrew from representing Raybern. Young's negotiations for and drafting of Raybern's contracts with Rose & Shore failed to adequately protect Raybern's long-term financial interests in its relationship with Rose & Shore.

14. Young's disclosures and services fell below the standard of care for legal professionals and proximately cause damage to Raybern, for which Raybern seeks recovery herein.

**THIRD CAUSE OF ACTION - NEGLIGENCE**

(All Defendants)

15. Cross-complainant realleges paragraphs 1 through 10 as though fully set forth herein.

16. Cross-defendants and each of them owed Raybern a duty of care to protect the financial interests of Raybern in the series of transactions in which defendants were involved. Cross-defendants breached their duty of care to Raybern, resulting in past and future financial losses.

**FOURTH CAUSE OF ACTION - PROMISSORY FRAUD**

(Fults; TRI)

17. Cross-complainant realleges paragraphs 1 through 10 as though fully set forth herein.

18. TRI, through its purported agent Fults, knowingly misrepresented its

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1 background and skill in brokering deals of the sort that Raybern and Rose & Shore  
2 were contemplating. Furthermore, they misrepresented the nature of the services  
3 they would be providing; neither TRI nor Fults intended to provide due diligence  
4 through the life of the Raybern/Rose & Shore contract, despite the fact that Raybern  
5 needed those services and had expressly obtained TRI/Fults's agreement to provide  
6 such services in exchange for its commission.

7 19. In entering into an agreement with TRI/Fults, Raybern relied on TRI  
8 and Fults's representations as to the degree of skill and type of services it would be  
9 providing in connection with the negotiation of the Raybern/Rose & Shore  
10 transaction. Raybern's reliance on cross-defendants' representations was  
11 reasonable.

12 20. As a result of Raybern's reliance on TRI and Fults's representations,  
13 Raybern suffered consequential damages in an amount to be proven at trial.

14 21. TRI/Fults intentional conduct was undertaken with aim of causing  
15 Raybern injury and was sufficient to support an award of punitive damages  
16 pursuant to Civil Code §3294.

17  
18 **PRAYER FOR RELIEF**

19 Wherefore cross-defendant prays for relief as follows:

- 20 1. For compensatory damages according to proof;
- 21 2. For a disgorgement of all professional fees paid to Robert Young and the  
22 Law Offices of Robert L. Young in connection with professional services rendered in  
23 connection with the transactions underlying this lawsuit;
- 24 3. For punitive damages according to proof;
- 25 4. For costs of suit herein; and
- 26 5. For such other and further relief as the Court deems just and proper.
- 27  
28

1 Dated: March 18, 2005

2  
3 LAW OFFICES OF KYRA SUBBOTIN

4  
5 By: Kyra A. Subbotin  
6 Kyra A. Subbotin

7  
8  
9 **DEMAND FOR JURY TRIAL**

10 Cross-complainant Raybern Foods, Inc. hereby demands a jury trial of all  
11 claims asserted herein.

12  
13 Dated: March 18, 2005

14  
15 LAW OFFICES OF KYRA SUBBOTIN

16  
17 By: Kyra A. Subbotin  
18 Kyra A. Subbotin

**PROOF OF SERVICE**

[C.C.P. § 1013, C.R.C. § 2008, F.R.C.P. Rule 5]

I, Kyra A. Subbotin, state:

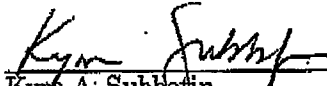
I am a citizen of the United States. My business address is 2625 Alcatraz Avenue, No. 152, Berkeley, California 94705. I am employed in the city of Berkeley, County of Alameda, where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served **Cross-complaint of Raybern Foods, Inc.** on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Albert E. Cordova, Esq.  
1299 Fourth Street, Suite 202  
San Rafael, CA 94901  
Facsimile: 415 453-6260

- : BY FIRST CLASS MAIL - I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.
- X: BY FACSIMILE - I caused said document to be transmitted by Facsimile machine to the number indicated after the address(es) noted above pursuant to a written agreement between counsel for the parties in this action.
- : BY HAND DELIVERY - I caused said document to be hand delivered to the person(s) noted above.
- : BY OVERNIGHT MAIL - I caused said document to be placed with an overnight mailing service for delivery the following business day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at Point Richmond, California.

Dated: March 22, 2005

  
Kyra A. Subbotin

52533.1

FILED BY FAX

ALAMEDA COUNTY

July 26, 2005

CLERK OF  
THE SUPERIOR COURT  
By Rosanne Case, Deputy

CASE NUMBER:

RG04141329

LAW OFFICES OF KYRA A. SUBBOTIN  
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Attorney for Defendants Raybern Foods, Inc.  
and Bernard J. Viggiano

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

TRI COMMERCIAL REAL ESTATE  
SERVICES, INC.,

Plaintiff,

vs.

RAYBERN FOODS, INC., BERNARD  
J. VIGGIANO, and DOES 1-20

Defendants.

Case No. RG 04141329

FIRST AMENDED CROSS-  
COMPLAINT AGAINST TRI  
COMMERCIAL REAL ESTATE  
SERVICES, INC., JOHN FULTS,  
AND ROBERT L. YOUNG,  
INDIVIDUALLY AND DBA LAW  
OFFICES OF ROBERT L. YOUNG

RAYBERN FOODS, INC.,

Cross-complainant,

vs.

TRI COMMERCIAL REAL ESTATE  
SERVICES, INC., JOHN FULTS,  
ROBERT L. YOUNG, individually and  
dba LAW OFFICES OF ROBERT  
YOUNG

Cross-defendants.

Cross-complainant Raybern Foods, Inc. (Raybern) alleges as follows:

GENERAL ALLEGATIONS

1. TRI Commercial Real Estate Services, Inc. (TRI) is and at all relevant

1 times was a California corporation that had its principal place of business in San  
2 Francisco and is the plaintiff in this action. TRI provides professional brokerage  
3 services to client throughout the state of California and within the jurisdiction of  
4 this Court.

5 2. Cross-complainant is informed and believes and thereon alleges that John  
6 Fults (Fults) is and at all relevant times was a licensed real estate agent and  
7 independent contractor affiliated with TRI. At all relevant times, Fults held  
8 himself out as president of Keystone Financial , a different corporation than TRI  
9 and one for which Fults served as president. The exact nature of the relationship  
10 between Keystone Financial and TRI is as yet unknown. Fults held himself out to  
11 Raybern as someone with superior financial knowledge and abilities and significant  
12 experience in handling the type of transactions that form the basis of this lawsuit.

13 3. Cross-complainant is informed and believes and thereon alleges that  
14 Robert L. Young (Young) was an officer and director of TRI and, as such, had a  
15 degree of control over or influence on TRI's actions herein. With respect to certain  
16 actions alleged herein, Young acted as TRI's agent and within the course and scope  
17 of his position as an officer and/or director of TRI. Raybern contends that in failing  
18 to disclose his role as an officer and director of TRI, Young placed his interests as an  
19 officer and/or director of TRI above his professional obligations to Raybern.

20 Raybern is further informed and believes that Robert L. Young was at all times a  
21 member of the California bar and a practicing attorney claiming expertise in the  
22 type of transactions that form the basis of this lawsuit. Raybern is informed and  
23 believes and thereon alleges that Young was an undisclosed business associate of  
24 Fults and served as an advisor to various business entities owned and/or controlled  
25 by Fults.

26 4. Cross-complainant is informed and believes and thereon alleges that  
27 Robert L. Young, a California lawyer, was the owner and sole proprietor of the Law  
28 Offices of Robert L. Young, a professional corporation at various times relevant

1 herein. Young and the Law Offices of Robert L. Young provided advice and  
2 services to Raybern in connection with the transactions between Raybern and Rose  
3 & Shore as well as other business matters during the same time period that the  
4 Rose & Shore transactions were being negotiated. In such a capacity, Young and  
5 the Law Offices of Robert L. Young owed a fiduciary duty to Raybern.

6 5. The acts set forth herein occurred within the jurisdiction of this Court and  
7 are related to and part of the series of transactions forming the basis of the TRI's  
8 complaint.

9  
10 **FIRST CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY**

11 (Against Fults, and TRI)

12 6. In early 2001, Raybern retained TRI, through its purported agent, John  
13 Fults, to represent Raybern in connection with negotiations toward the formation of  
14 a strategic business alliance with another entity, Rose & Shore. The purpose of  
15 that alliance, among other things, was to allow Rose & Shore to take over the  
16 manufacturing of certain products, including products that were provided to  
17 Raybern's major client, Togo's Eateries, Inc. (Togo's) and to ultimately allow  
18 Raybern to close its Hayward manufacturing plant. In agreeing to represent  
19 Raybern in the transactions with Rose & Shore, Fults and TRI were acting as  
20 fiduciaries to Raybern and owed Raybern the highest duty of honesty and loyalty in  
21 negotiating the business alliance with Rose & Shore. At the time Raybern retained  
22 TRI, it did not know of or understand the true relationship between TRI and Fults,  
23 nor did it understand the full relationship between TRI and its then-officer/director  
24 Young, who was also involved in the negotiation of the Rose & Shore contracts and  
25 who subsequently represented Raybern in other unrelated business transactions..

26 7. TRI, through its purported agent Fults, then urged Raybern to hire Young  
27 to perform services of a legal and business nature for Raybern. On Fults'  
28 recommendation, Raybern did hire Young in May 2001 and continued to pay Young

1 for his services through at least November 2002. Raybern paid Young professional  
2 fees in excess of \$51,000 in connection with the Rose & Shore transactions, and also  
3 paid Young for services in connection with at least two other business matters in  
4 which Young provided advice to Raybern.

5 8. TRI, and its purported agent Fults, breached their fiduciary duty to  
6 Raybern by failing to disclose Fults's background and experience and for failing to  
7 disclose the relationships between TRI, Young, and Fults. Specifically, Raybern  
8 would not have engaged Fults had it known of Fults's true business background  
9 and Fults's own legal troubles, including a personal bankruptcy and threatened or  
10 ongoing litigation involving allegations of breach of fiduciary. TRI and Fults  
11 likewise breached their fiduciary duty to Raybern by failing and refusing to fulfill  
12 their promise to monitor Rose & Shore's performance and payments under its  
13 contract with Raybern and by withdrawing from the transaction before it was  
14 finalized. TRI and Fults breached their fiduciary obligations to Raybern by failing  
15 to insure that Raybern's goal – tying the August 20, 2001 licensing agreement  
16 between Rose & Shore and Raybern to continued performance by Rose & Shore  
17 under a separate Manufacturing Agreement executed that same date – was  
18 achieved. Instead, the Manufacturing Agreement, which involved the manufacture  
19 of sandwich products for customers other than Togo's, contained a provision  
20 allowing Rose & Shore to terminate the agreement upon eight months' notice and in  
21 the absence of default by Raybern. Rose & Shore has, in fact, exercised its right to  
22 terminate the Manufacturing Agreement and has continued to operate under the  
23 Licensing Agreement. Finally, TRI and Fults breached their fiduciary duty by  
24 failing to disclose that the attorney they were recommending to represent Raybern  
25 was, in fact, a business associate of Fults and an officer and director of TRI, and  
26 therefore had a vested interest in ensuring that the Rose & Shore transaction was  
27 consummated so that TRI would receive a commission.

28 9. As a proximate result of TRI and Fult's breach of its fiduciary duty to



1 Raybern, Raybern has incurred damages, including but not limited to (1) fees paid  
2 to Young for certain negotiating services that should have been performed by TRI  
3 and Fults under their agreement with Raybern; (2) fees paid to Young for services  
4 which benefitted TRI and not Raybern; (3) attorneys fees incurred in an attempt to  
5 prevent Rose & Shore's unilateral withdrawal from the Manufacturing Agreement;  
6 and (4) costs incurred in connection with monitoring the Rose & Shore relationship,  
7 as Fults had promised he would do but failed to do; and (5) costs relating to re-  
8 opening of Raybern's Hayward facility as a result of Rose & Shore's termination of  
9 the Manufacturing Agreement without cause.

10  
11 **SECOND CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY**

12 (Against Robert L. Young, Law Offices of Robert L. Young)

13 10. Raybern realleges paragraphs 1-5 and paragraph 7 as though fully set  
14 forth herein.

15 11. Raybern hired Young and the Law Offices of Robert L. Young  
16 (collectively "Young") on or about May 10, 2001, at TRI and Fults's  
17 recommendation. At the time Raybern hired Young and commenced payment for  
18 his services, Raybern did not know that Young was, in fact, an officer and/or  
19 director of TRI. Neither TRI, nor Fults, nor Young disclosed that fact, and none of  
20 them disclosed that Fults had a prior and ongoing personal and/or professional  
21 relationship with Young and that Young had also served as an agent of other  
22 business entities owned or controlled by Fults.

23 12. As Raybern's attorney, Young owed his client a fiduciary duty to disclose  
24 all relevant facts regarding his relationship with TRI and Fults. Specifically, he  
25 had an obligation to inform Raybern that he was then serving as an officer and/or  
26 director of TRI and therefore had conflicting fiduciary duties. He likewise had an  
27 obligation to inform Raybern of his relationship to Fults and his knowledge of Fults'  
28 business background and experience. Further, he had a duty to protect Raybern's



1 interest when Fults withdrew from the Rose & Shore transactions and to take all  
2 steps available to protect Raybern in connection with that withdrawal.

3 13. During the course of his representation of Raybern, and in the interest of  
4 effecting a transaction that would result in a commission to TRI, the company upon  
5 whose board he served, Young failed to disclose his relationships with TRI and  
6 Fults, and he failed adequately to protect Raybern's financial interests in the  
7 transactions with Rose & Shore. Specifically, Young failed to insure that the  
8 Manufacturing Agreement was tied to the Licensing Agreement; Instead the  
9 Manufacturing Agreement had a provision allowing Rose & Shore to terminate the  
10 Manufacturing Agreement even absent default by Raybern and yet continue to  
11 operate under the more lucrative Licensing Agreement. Young likewise breached  
12 his fiduciary duty to Raybern by failing to include language in the Licensing  
13 Agreement making it clear that Fults had the obligation to and would be  
14 monitoring the Rose & Shore financials through the life of the Raybern/Rose &  
15 Shore contract, an issue now in dispute in this lawsuit. Young likewise failed to  
16 take steps to protect Raybern's interest upon learning that Fults refused to continue  
17 performing under his contract with Raybern. Finally, when Raybern asked Young  
18 to review a listing agreement between TRI and Raybern – an agreement that would  
19 result in a commission to TRI upon sale of Raybern's Hayward property -- Young  
20 again failed to disclose his true relationship with TRI.

21 14. Young's breach of his fiduciary duty to his client, Raybern, proximately  
22 resulted in damage to Raybern. Specifically, Raybern paid Young over \$51,000 in  
23 attorneys fees which, under the law involving undisclosed conflicts of interest, he  
24 had no obligation to pay. Raybern has also been forced to incur attorneys fees to  
25 defend this action which would not have been brought had Young properly advised  
26 Raybern upon Fults's withdrawal from the underlying transaction. Raybern has  
27 also had to retain an attorney in connection with Rose & Shore's withdrawal from  
28 the Manufacturing Agreement – a withdrawal that should have been prohibited

1 absent a default by Raybern. Finally, as a result of Young's failure to draft a  
2 Manufacturing Contract that ensured Rose & Shore's continued performance,  
3 Raybern has incurred substantial costs to reopen its Hayward processing plant to  
4 accommodate the business heretofore handled by Rose & Shore under the  
5 Manufacturing Contract, yet is unable to withdraw from the Licensing Agreement.

6  
7 **THIRD CAUSE OF ACTION - PROFESSIONAL NEGLIGENCE**

8 (Robert Young/Law Offices of Robert L. Young)

9 15. Cross-complainant realleges paragraphs 1 through 5, 7, and 10-14 as  
10 though fully set forth herein.

11 16. Young's services on behalf of Raybern fell below the standard of care for  
12 legal professionals in that he failed to adequately fully disclose his relationship with  
13 TRI, in direct contravention of the Professional Rules of Conduct. Young likewise  
14 failed to protect his client's interests vis a vis TRI when TRI's agent withdrew from  
15 representing Raybern by either negotiating a novation of the Fults/Raybern  
16 contract or disclosing his ongoing conflict and referring Raybern to other counsel.  
17 As a result, Raybern is now forced to defend this action. Young's negotiations and  
18 drafting of Raybern's contracts with Rose & Shore likewise fell below the standard  
19 of care in that they did not adequately protect Raybern or accomplish Raybern's  
20 stated goal of ensuring that Rose & Shore would be handling all of its  
21 manufacturing, not just that implicated in the Licensing Agreement. Raybern  
22 made clear that it was closing its Hayward facility and, as a consequence, Rose &  
23 Shore should not be given an opportunity to unilaterally repudiate its obligations  
24 under the Manufacturing Agreement while maintaining the more lucrative business  
25 that was the subject of the Licensing Agreement. In drafting the Manufacturing  
26 Agreement and providing Rose & Shore with the ability to withdraw from the  
27 contract even absent default by Raybern, Young failed to protect his client's goals.

28 17. Young's breach of his professional duty to his client, Raybern,

1 proximately resulted in damage to Raybern. Specifically, Raybern has been forced  
2 to incur attorneys fees to defend this action. Raybern has also had to retain an  
3 attorney in connection with Rose & Shore's withdrawal from the Manufacturing  
4 Agreement – a withdrawal that should have been prohibited absent a default by  
5 Raybern. Finally, as a proximate result of Young's failure to draft a  
6 Manufacturing Contract that ensured Rose & Shore's continued performance,  
7 Raybern has incurred substantial costs to reopen its Hayward processing plant to  
8 accommodate the business heretofore handled by Rose & Shore under the  
9 Manufacturing Contract. Finally, as a proximate result of Young's breach of his  
10 obligation to fully disclose his relationship with TRI and Fults, Raybern has  
11 incurred fees paid to Young, and hereby seeks disgorgement of those fees.  
12

13 **FOURTH CAUSE OF ACTION - NEGLIGENCE**

14 (All Defendants)

15 18. Cross-complainant realleges paragraphs 1 through 9, 11 through 14, and  
16 16 through 17, as though fully set forth herein.

17 19. Cross-defendants and each of them owed Raybern a duty of ordinary care  
18 to protect the financial interests of Raybern in the series of transactions in which  
19 defendants were involved. Raybern reasonably relied on the professional expertise  
20 of TRI, Fults, and Young in protecting his interests in the transactions with Rose  
21 & Shore and ensuring that Raybern's goal of shifting its manufacturing business  
22 to Rose & Shore was accomplished. As outlined above, cross-defendants and  
23 each of them, breached their duty of care to Raybern. As a proximate result of  
24 Young's failure to draft a Manufacturing Contract that ensured Rose & Shore's  
25 continued performance, Raybern has incurred substantial costs to reopen its  
26 Hayward processing plant to accommodate the business heretofore handled by Rose  
27 & Shore under the Manufacturing Contract. Finally, as a proximate result of  
28 Young's breach of his obligation to fully disclose his relationship with TRI and

1 Fults, Raybern has incurred fees paid to Young, and hereby seeks disgorgement of  
2 those fees.

3  
4 **FIFTH CAUSE OF ACTION - PROMISSORY FRAUD**

5 (Fults; TRI)

6 20. Cross-complainant realleges paragraphs 1 through 5 as though fully set  
7 forth herein.

8 21. TRI, through its purported agent Fults, knowingly misrepresented its  
9 background and skill in brokering deals of the sort that Raybern and Rose & Shore  
10 were contemplating. Furthermore, they misrepresented the nature of the services  
11 they would be providing; neither TRI nor Fults intended to provide due diligence  
12 through the life of the Raybern/Rose & Shore contract, despite the fact that Raybern  
13 needed those services and had expressly obtained TRI/Fults's agreement to provide  
14 such services in exchange for its commission.

15 22. In entering into an agreement with TRI/Fults, Raybern reasonably relied  
16 on TRI and Fults's representations as to the degree of skill and type of services it  
17 would be providing in connection with the negotiation of the Raybern/Rose & Shore  
18 transaction.

19 23. As a result of Raybern's reliance on TRI and Fults's representations,  
20 Raybern suffered consequential damages in that TRI and Fults did not adequately  
21 protect Raybern's interests in the Rose & Shore transactions and Raybern has had  
22 to provide its own due diligence and has had to continue to negotiate the terms of  
23 its deal with Rose & Shore, at substantial cost to Raybern.

24 24. TRI/Fults intentional conduct was undertaken with fraud and with the  
25 aim of causing Raybern injury and was sufficient to support an award of punitive  
26 damages pursuant to Civil Code §3294.

**PRAYER FOR RELIEF**

Wherefore cross-defendant prays for relief as follows:

1. For compensatory damages according to proof;
2. For a disgorgement of all professional fees paid to Robert Young and the Law Offices of Robert L. Young in connection with professional services rendered to Raybern;
3. For punitive damages according to proof;
4. For costs of suit herein; and
5. For such other and further relief as the Court deems just and proper.

Dated: July 25, 2005

LAW OFFICES OF KYRA SUBBOTIN

By:   
Kyra A. Subbotin

**DEMAND FOR JURY TRIAL**

Cross-complainant Raybern Foods, Inc. hereby demands a jury trial of all claims asserted herein.

Dated: July 25, 2005

LAW OFFICES OF KYRA SUBBOTIN

By:   
Kyra A. Subbotin

**PROOF OF SERVICE**

[C.C.P. § 1013, C.R.C. § 2008, F.R.C.P. Rule 5]

I, Kyra A. Subbotin, state:

I am a citizen of the United States. My business address is 2625 Alcatraz Avenue, No. 152, Berkeley, California 94705. I am employed in the city of Berkeley, County of Alameda, where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served **FIRST AMENDED CROSS-COMPLAINT** on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

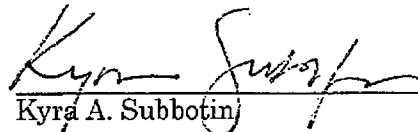
Albert E. Cordova, Esq.  
1299 Fourth Street, Suite 202  
San Rafael, CA 94901  
Facsimile: 415 453-6260

Frederick Hagen, Esq.  
Berding & Weil  
3240 Stone Valley Road West  
Alamo, CA 94507

- ✕ BY FIRST CLASS MAIL - I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.
- \_: BY FACSIMILE - I caused said document to be transmitted by Facsimile machine to the number indicated after the address(es) noted above pursuant to a written agreement between counsel for the parties in this action.
- \_: BY HAND DELIVERY - I caused said document to be hand delivered to the person(s) noted above.
- \_: BY OVERNIGHT MAIL - I caused said document to be placed with an overnight mailing service for delivery the following business day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at Berkeley, California.

Dated: July 26, 2005

  
Kyra A. Subbotin



1 Clifford R. Horner, Esq., State Bar No. 154353  
2 Fredrick A. Hagen, Esq., State Bar No. 196220  
3 **BERDING & WEIL LLP**  
3240 Stone Valley Road West  
4 Alamo, California 94507  
Telephone: 925/838-2090  
Facsimile: 925/820-5592

5 Attorneys for Cross-Defendant and Cross-Complainant  
6 ROBERT YOUNG

**FILED**  
ALAMEDA COUNTY

AUG 24 2005

CLERK OF THE SUPERIOR COURT

*Walter J. Dan*  
DEPUTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF ALAMEDA

11 TRI COMMERCIAL REAL ESTATE SERVICES, INC., No. RG 04141329

12 Plaintiff,

13 vs.

14 RAYBERN FOODS, INC., BERNARD J. BIGGIANO,  
15 and DOES 1-20

16 Defendants.

17 RAYBERN FOODS, INC.,

18 Cross-Complainant,

19 vs.

20 TRI COMMERCIAL REAL ESTATE SERVICES, INC.,  
JOHN FULTS, ROBERT L. YOUNG, individually and  
21 dba LAW OFFICES OF ROBERT YOUNG,

22 Cross-Defendants.

23 ROBERT YOUNG,

24 Cross-Complainant,

25 vs.

26 TRI COMMERCIAL REAL ESTATE SERVICES, INC.;  
JOHN FULTS, an individual, and ROES 1-50, inclusive,

27 Cross-Defendants.

28 CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

EXHIBIT 4

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1. Comes now Cross-Complainant Robert Young ("Young" or "Cross-Complainant") in the  
2 above-entitled matter and alleges as follows:

3 **FIRST CAUSE OF ACTION**  
4 **(Equitable Indemnity)**  
5 **Against All Cross-Defendants**

6 1. Cross-Defendant TRI COMMERCIAL REAL ESTATE SERVICES, INC.  
7 ("TRI") is, and at all times herein mentioned was, a corporation organized and existing under the  
8 laws of the State of California, doing business in the State of California, County of Alameda.

9 2. Cross-Defendant John Fults ("Fults") is an individual residing or doing business in  
10 the County of Alameda, State of California.

11 3. Roe Cross-Defendants 1-50 are alleged herein to be in some manner the servants,  
12 employees, co-venturers, partners, agents or principals, of some or all of each other Cross-  
13 Defendants and, for each other were acting within the course and scope of their venture,  
14 partnership, agency or employment at all times relevant hereto.

15 4. The true names and capacities of the Cross-Defendants sued as Roes 1-50 herein  
16 are unknown to Cross-Complainant at this time. Cross-Complainant will seek leave of court to  
17 amend this cross-complaint to assert the true names and/or capacities of the Roe Cross-  
18 Defendants, if and when that information becomes available.

19 5. In the principal action, Cross-Complainant Raybern Foods, Inc. ("Raybern")  
20 alleges, among other things, conduct entitling it to compensatory damages against TRI, John  
21 Fults, and Young. Those allegations are specifically and unequivocally denied by Young, but are  
22 set forth and incorporated herein in their entirety for reference purposes only. Young contends  
23 that it is not liable to anyone in any manner for the events and/or occurrences described in  
24 Raybern's Cross-Complaint.

25 6. If Young is found to be liable to Cross-Complainant Raybern in some manner, or  
26 to anyone else, as a result of the incidents and occurrences described in the Raybern Cross-  
27 Complaint, the liability of Young would be based solely upon some derivative form of liability,  
28 not resulting from his own conduct, but only based upon an obligation imposed upon him by law.  
Therefore, Young would be entitled to complete equitable indemnity from Cross-Defendants

-2-

CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.



1 herein, and each of them.

2 WHEREFORE, Cross-Complainant prays for damages as set forth below.

3 **SECOND CAUSE OF ACTION**  
 4 **(Apportionment of Fault)**  
**Against All Cross-Defendants**

5 7. Cross-Complainant repeats and realleges the allegations set forth in paragraphs 1  
 6 through 6, as if fully set forth herein.

7 8. On information and belief, if any liability is found pursuant to Raybern's Cross-  
 8 Complaint, each Cross-Defendant named herein was responsible, in whole or in part, for the  
 9 injuries and damages, if any, sustained by Raybern. If Young is adjudged liable to Raybern, each  
 10 Cross-Defendant herein should be required to pay that share of any such judgment which is  
 11 proportionate to the comparative negligence of that Cross-Defendant, and to reimburse Cross-  
 12 Complainant for any payments it might make to Raybern in excess of its proportionate share of  
 13 all Cross-Defendants' negligence.

14 WHEREFORE, Cross-Complainant prays for damages as set forth below.

15 **THIRD CAUSE OF ACTION**  
 16 **(Express Indemnity)**  
**Against TRI Only**

17 9. Cross-Complainant repeats and realleges the allegations set forth in paragraphs 1  
 18 through 8, as if fully set forth herein.

19 10. The allegations against Young in Raybern's Cross-Complaint are based on  
 20 Young's alleged activities as an officer and director of TRI. For example, Paragraph 3 of  
 21 Raybern's First Amended Cross-Complaint states:

22 "Cross-Complainant is informed and believes and thereon alleges  
 23 that Robert L. Young (Young) was an officer and director of TRI  
 24 and, as such, had a degree of control over or influence on TRI's  
 25 actions herein. With respect to certain actions alleged herein,  
 26 Young acted as TRI's agent and within the course and scope of his  
 27 position as an officer and/or director of TRI. Raybern contends  
 28 that in failing to disclose his role as an officer and director of TRI,  
 Young placed his interests as an officer and/or director of TRI  
 above his professional obligations to Raybern." (Emphasis in bold  
 added.)

11. As shown, Raybern's Cross-Complaint is brought against Young in his capacity as and based upon his actions and interests as an officer and/or director of TRI.

12. TRI is obligated to defend and indemnify Young under Section 29 of the Amended and Restated Bylaws of TRI (the "TRI Bylaws"), dated January 29, 1996, and under Section 317 of the California Corporations Code. Section 29 of the TRI Bylaws states, in pertinent part:

(a) Indemnification. To the fullest extent permissible under California law, and, to the extent authorized by the Articles of Incorporation, in excess of that which is expressly permitted by Section 317 of the California Corporations Code, the corporation shall indemnify its directors and officers against all expenses, judgments, fines, settlements and other amounts actually and reasonably incurred by them in connection with any proceeding, including an action by or in the right of the corporation, by reason of the fact that such director or officer is or was serving as a director, officer, trustee, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, trustee, employee or agent of another corporation, or of a partnership, joint venture, trust or other enterprise (including service with respect to employee benefit plans). To the fullest extent permissible under California law, expenses incurred by a director or officer seeking indemnification under this Bylaw in defending any proceeding shall be advanced by the corporation as they are incurred upon receipt by corporation of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that the director or officer is not entitled to be indemnified by the corporation for those expenses. The rights granted by this Bylaw are contractual in nature and, as such, may not be altered (other than prospectively in connection with acts and liabilities not occurring or arising prior to the date of alteration) with respect to any present or former director or officer without the written consent of that person.

(b) Procedure. Upon written request to the Board of Directors by a person seeking indemnification under this Bylaw, the Board shall promptly determine in accordance with Section 317(e) of the California Corporations Code whether the applicable standard of conduct has been met and, if so the Board shall authorize indemnification. If the Board cannot authorize indemnification because the number of directors who are parties to the proceeding with respect to which indemnification is sought prevents the formation of a quorum of directors who are not parties to the proceeding, then, upon written request by the person seeking indemnification, independent legal counsel (by means of a written opinion obtained at the corporation's expense) or the corporation's shareholders shall determine whether the applicable standard of conduct has been met and, if so, shall authorize indemnification.

(c) Definitions. The term "proceeding" means any threatened, pending or completed action or proceeding, whether civil, criminal,

CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

1 administrative or investigative. The term "expenses" includes,  
2 without limitation, attorneys' fees and any expenses of establishing  
a right to indemnification.

3 13. The allegations against Young in the Cross-Complaint are specifically based on  
4 the fact that Mr. Young was an officer and director of TRI. Thus, under California Corporations  
5 Code Section 317(d), TRI must pay Mr. Young's expenses actually and reasonably incurred in  
6 successful defense of the Raybern cross-complaint, including without limitation attorneys' fees,  
7 court costs, and expert witness fees. Young's mandatory right to indemnity under Section 317  
8 also extends to the successful defense of any claims which may be brought against him by TRI  
9 based on his actions while an officer or director.

10 14. Under Section 29 of the TRI Bylaws, Mr. Young is entitled to "indemnification to  
11 the fullest extent permissible under California law...against all expenses, judgments, fines,  
12 settlements and other amounts actually and reasonably incurred...by reason of the fact  
13 that...[he]...was serving as a director, officer, . . . , employee or agent" of TRI. TRI is also  
14 required to advance Young the expenses incurred by Young in defending against the Raybern  
15 Cross-Complaint.

16 15. Young tendered the defense of Young and demanded TRI indemnify him for any  
17 and all liability, claims, obligations, causes of action, judgments and all other costs and expenses,  
18 including attorney's fees and costs incurred by Young in connection with the Raybern Cross-  
19 Complaint at any time. Young also demanded that TRI agree to advance to Young the expenses  
20 he has incurred in defending against the Raybern Cross-Complaint. TRI refused to comply with  
21 its legal and contractual obligations to defend and indemnify Young. Young therefore herein  
22 seeks reimbursement for all attorney fees, costs, and expenses related to the action and tendering  
23 indemnity to TRI, including pre- and post-judgment interest.

24 16. Young has performed all the conditions and obligations to be performed on its  
25 behalf under his agreements with TRI. Pursuant to the above, TRI is obligated to defend and  
26 indemnify Cross-Complainant Young herein.

27 17. Cross-Complainant Young has demanded, and continues to demand that Cross-  
28 Defendant TRI defend and indemnify Cross-Complainant Young with respect to the claims of

CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

1 Raybern in this matter. To date, TRI has failed, refused and/or neglected, and still fails, refuses  
2 and/or neglects to do so.

3 18. Cross-Complainant Young has incurred, and continues to incur, necessary and  
4 reasonable attorneys' fees and other legal costs in defending this action brought by Raybern. By  
5 the terms of the agreements, if it is determined that TRI breached the agreements by failing to  
6 defend and indemnify Cross-Complainant, then Cross-Complainant will be entitled to recover its  
7 reasonable attorneys fees and court costs in connection with the defense of the action and the  
8 prosecution of this cross-complaint.

9 19. By reason of the foregoing, Cross-Complainant Young is entitled to be  
10 indemnified by Cross-Defendant TRI for all losses and damages Cross-Complainant may incur  
11 by way of defense of the underlying action, and by way of payments, if any, to Raybern in  
12 connection with the settlement of this case or satisfaction of any judgment Raybern might obtain.

13 WHEREFORE, Cross-Complainant prays for damages as set forth below.

14 **FOURTH CAUSE OF ACTION**  
15 **(Declaratory Relief)**

16 20. Cross-Complainant repeats and realleges the allegations set forth in paragraphs 1  
17 through 19, as if fully set forth herein.

18 21. An actual controversy has arisen between the parties concerning their respective  
19 rights and obligations. Based upon the allegations of Raybern's Cross-Complaint, Cross-  
20 Complainant Young alleges that Cross-Defendants herein are responsible to compensate Raybern  
21 for its injuries and damages, if any such occurred, and that Cross-Defendants are liable and must  
22 indemnify cross-complainant for all damages and any judgment rendered against Cross-  
23 Complainant in this Action, and defend Young herein, and Cross-Defendants dispute same. The  
24 parties have no plain, speedy and adequate remedy at law, and therefore seek a declration of the  
25 rights and obligations of the parties herein.

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CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

1 WHEREFORE, Young prays judgment on this cross-complaint as follows:

2 **FIRST, SECOND AND FOURTH CAUSES OF ACTION:**

3 1. That Cross-Complainant be indemnified, in whole or in part, by Cross-  
4 Defendants, and each of them, with respect to any and all payments made or judgments rendered  
5 against it;

6 2. For a judgment for all or part of any sums for which Cross-Complainant may be  
7 adjudged to be liable to Raybern from Cross-Defendants, and each of them;

8 3. For a declaration of rights and obligations as to all parties herein with respect to  
9 their proportionate share of fault, in any, in causing or contributing to the injuries and damages, if  
10 any, sustained by Rabyern;

11 4. For a declaration that Cross-Defendants, and each of them, must indemnify Cross-  
12 Complainant;

13 5. For costs of suit incurred herein; and

14 6. For such other and further relief as the court may deem just and proper.

15 **THIRD CAUSE OF ACTION:**

16 7. For judgment against TRI declaring that it is under a contractual duty to reimburse  
17 Cross-Complainant for such amounts as it may be held liable for to any party, together with costs  
18 and expenses incurred in defense of the Cross-Complaint commenced by the Raybern, including  
19 attorneys fees and indemnification with respect to any and all payments made or judgments  
20 rendered against it;

21 8. For attorney's fees incurred in connection with the prosecution for this cross-  
22 complaint;

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CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

1 9. For costs of suit incurred herein; and

2 10. For such other and further relief as the court may deem just and proper.

3 Date: August 23, 2005

**BERDING & WEIL LLP**

4  
5 By: 

6 Clifford R. Horner

7 Attorneys for Cross-Complainant

8 ROBERT YOUNG

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CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE  
INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS  
INDEMNITY AND DECLARATORY RELIEF.

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# PROOF OF SERVICE

**Case Name:** TRI Commercial Real Estate v. Raybern Foods, Inc., et al.  
**Case No:** RG04141329

I am employed in the County of Contra Costa, State of California. My business address is 3240 Stone Valley Road West, Alamo, California 94507. I am over the age of eighteen years, and not a party to the within action

On August 23, 2005, I caused to be served the within:

## CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS INDEMNITY AND DECLARATORY RELIEF

on the party(ies) listed below, addressed as follows:

### (SEE ATTACHED SERVICE LIST)

☐ **By Facsimile Transmission [C.C.P. § 1013; CRC 10081].** By causing a true copy thereof to be served by transmission from facsimile number (925) 820-5592 between the hours of 9:00 a.m. and 5:00 p.m., on the party(ies) at the facsimile telephone number(s) last provided by the party(ies) as stated on the attached service list. The transmission was reported as complete and without error, with a transmission report properly issued by the transmitting facsimile machine.

☒ **By First Class Mail/Ordinary Business Practices [C.C.P. §§ 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the United States Postal Service. Under the firm's practice, mail is deposited in the ordinary course of business with the United States Postal Service at Alamo, California, that same day, with postage thereon fully prepaid. I am aware that upon motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after the date of deposit for mailing.

☐ **By Overnight Delivery [C.C.P. § 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package designated by the express service carrier, with all delivery fees paid or provided for, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of overnight deliveries for deposit in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents. Under the firm's practice, overnight deliveries are deposited in the ordinary course of business with the express service carrier at Alamo, California, that same day.





**By Personal Service [C.C.P. § 1011].** By causing a true copy thereof to be placed in a sealed envelope or package addressed to the party[ies] as stated on the attached mailing list.

Executed August 23, 2005, at Alamo, California.

By: 

Ane Rosario



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**SERVICE LIST**

**Case Name:** TRI Commercial Real Estate v. Raybern Foods, Inc., et al.  
**Case No:** RG04141329

---

Mr. Albert E. Cordova  
Law Offices of Albert E. Cordova  
Diversified Financial Center  
1299 Fourth Street, Suite 202  
San Rafael, CA 94901  
**Facsimile: 415/453-6260**

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# PROOF OF SERVICE

**Case Name:** TRI Commercial Real Estate v. Raybern Foods, Inc., et al.  
**Case No:** RG04141329

I am employed in the County of Contra Costa, State of California. My business address is 3240 Stone Valley Road West, Alamo, California 94507. I am over the age of eighteen years, and not a party to the within action

On August 23, 2005, I caused to be served the within:

## CROSS-COMPLAINT OF ROBERT YOUNG FOR EQUITABLE INDEMNITY, APPORTIONMENT OF FAULT, EXPRESS INDEMNITY AND DECLARATORY RELIEF

on the party(ies) listed below, addressed as follows:

### (SEE ATTACHED SERVICE LIST)

☐

**By Facsimile Transmission [C.C.P. § 1013; CRC 10081].** By causing a true copy thereof to be served by transmission from facsimile number (925) 820-5592 between the hours of 9:00 a.m. and 5:00 p.m., on the party(ies) at the facsimile telephone number(s) last provided by the party(ies) as stated on the attached service list. The transmission was reported as complete and without error, with a transmission report properly issued by the transmitting facsimile machine.

☐

**By First Class Mail/Ordinary Business Practices [C.C.P. §§ 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the United States Postal Service. Under the firm's practice, mail is deposited in the ordinary course of business with the United States Postal Service at Alamo, California, that same day, with postage thereon fully prepaid. I am aware that upon motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after the date of deposit for mailing.

☒

**By Overnight Delivery [C.C.P. § 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package designated by the express service carrier, with all delivery fees paid or provided for, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of overnight deliveries for deposit in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents. Under the firm's practice, overnight deliveries are deposited in the ordinary course of business with the express service carrier at Alamo, California, that same day.



**By Personal Service [C.C.P. § 1011].** By causing a true copy thereof to be placed in a sealed envelope or package addressed to the party[ies] as stated on the attached mailing list.

Executed August 23, 2005, at Alamo, California.

By: *Ane Rosario*

Ane Rosario

**SERVICE LIST**

**Case Name:** TRI Commercial Real Estate v. Raybern Foods, Inc., et al.  
**Case No:** RG04141329

---

Kyra A. Subbotin  
Law Offices of Kyra Subbotin  
2625 Alcatraz Avenue, No. 152  
Berkeley, CA 94705  
Telephone: 510/923-0451  
Facsimile: 510/923-0565

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ALBERT E. CORDOVA (State Bar No. 74283)  
 A Professional Law Corporation  
 1299 Fourth St., Suite 202  
 San Rafael, California 94901  
 Telephone: (415) 457-9656  
 Telefacsimile: (415) 453-6260

**FILED**  
 ALAMEDA COUNTY

SEP 19 2005

CLERK OF THE SUPERIOR COURT

Attorneys for Plaintiff TRI COMMERCIAL REAL ESTATE  
 SERVICES, INC., a California corporation and JOHN FULTS

*SA Alameda*  
 Deputy

THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

TRI COMMERCIAL REAL ESTATE  
 SERVICES, INC., et al.,

) No. RGO4141329

Plaintiff(s),

) CROSS-COMPLAINT ON  
 ) BEHALF OF TRI

vs.

) COMMERCIAL REAL ESTATE  
 ) SERVICES, INC. AND JOHN

RAYBERN FOODS, INC., BERNARD J.  
 VIGGIANO and DOES 1-20,

) FULTS AND AGAINST ROBERT  
 ) YOUNG FOR BREACH OF

Defendant(s).

) FIDUCIARY DUTY, LEGAL  
 ) MALPRACTICE, INDEMNITY,  
 ) CONTRIBUTION AND  
 ) DECLARATORY RELIEF

RAYBERN FOODS, INC.,

Cross-Complainants,

vs.

TRI COMMERCIAL REAL ESTATE  
 SERVICES, INC., JOHN FULTS, ROBERT  
 L. YOUNG, individually and dba LAW  
 OFFICES OF ROBERT YOUNG,.

Cross-Defendants.

1 ROBERT YOUNG,

NO. RGO4141329

2 Cross-complainant,

3 vs.

4 TRI COMMERCIAL REAL ESTATE  
5 SERVICES, INC., JOHN FULTS, an  
6 individual, and ROES 1-50, inclusive,

7 Cross-defendants.

8  
9 TRI COMMERCIAL REAL ESTATE  
10 SERVICES, INC. and JOHN FULTS,

11 Cross-complainants,

12 vs.

13  
14 ROBERT YOUNG and ZOES 1-20,

15 Cross-defendants.

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17  
18 Cross-complainants TRI COMMERCIAL REAL ESTATE SERVICES, INC. and  
19 JOHN FULTS allege the following causes of action against ROBERT YOUNG.

20  
21 **FIRST CAUSE OF ACTION**

22 **(Breach of Fiduciary Duty-Constructive Fraud)**  
23 **(On behalf of TRI Only)**

24 1. Cross-complainants are ignorant of the true names and capacities of Cross-  
25 defendants sued herein as ZOES 1-20, inclusive, and therefore sue these Cross-  
26

1 defendants by such fictitious names. Cross-complainants will amend this Cross-  
2 complaint to allege their true names and capacities when ascertained. Cross-  
3 complainants are informed and believe and thereon allege that, if these Cross-  
4 complainants are liable to Cross-complainant RAYBERN FOODS, INC. as alleged in  
5 the Cross-complaint in this action, each of the fictitiously named Cross-defendants is  
6 jointly or jointly and severally liable with Cross-complainants to Cross-complainant  
7 RAYBERN FOODS INC. for its damages as set forth therein. Each reference in this  
8 Cross-complaint to "Cross-defendant," "Cross-defendants," or a specifically named  
9 Cross-defendant refers also to all Cross-defendants sued under fictitious names.

12 2. Cross-complainants are informed and believe and on that basis allege that  
13 each cross-defendant individually or fictitiously named herein, acted in his, her, or its  
14 own right and also was or is the agent, employee, or servant of each of the other  
15 cross-defendants as to each of the matters set forth herein, and each such cross-  
16 defendant, whether individually or fictitiously named, was at all times acting within  
17 the scope and purpose of such agency, employment or service, or alternatively, if the  
18 acts of each such cross-defendant were not authorized at the time, such acts were  
19 subsequently ratified by the appropriate principal.

22 3. TRI COMMERCIAL REAL ESTATE SERVICES, INC. (hereinafter  
23 "TRI") is and at all times mentioned herein was, a real estate broker duly licensed by  
24

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1 the State of California engaged in the brokerage of both real estate transactions and  
2 business opportunities.

3  
4 4. Cross-defendant ROBERT YOUNG is and at all times mentioned herein  
5 was, an attorney at law duly licensed by the State of California.

6 5. At all times relevant to the facts herein pleaded, Cross-defendant ROBERT  
7 YOUNG served as a corporate officer and was a shareholder of Cross-complainant  
8 TRI. On October 18, 2001, Cross-defendant ROBERT YOUNG became a director of  
9 TRI. In addition to the foregoing, at all times relevant to the facts herein pleaded,  
10 Cross-defendant served as legal counsel for TRI.

11  
12 6. By virtue of the aforementioned relationship between Cross-defendant  
13 ROBERT YOUNG and TRI, Cross-defendant enjoyed a position of great trust and  
14 confidence with TRI and thereby owed to TRI a fiduciary duty of utmost care,  
15 integrity, honesty and undivided loyalty in his dealings with TRI.

16  
17 7. Separate and apart from his relationship to TRI, Cross-defendant ROBERT  
18 YOUNG also maintained a private law practice whereby he undertook to represent  
19 clients for his own account as an independent attorney at law.

20  
21 8. On or about May 7, 2001, RAYBERN FOODS, INC. retained TRI,  
22 through its agent JOHN FULTS, to represent it as a business broker in connection  
23 with certain business and contractual negotiations it was engaged in with ROSE AND  
24 SHORE, INC.



1           9. On or about May 10, 2001, acting within the course and scope of his duties  
2 as an independent attorney at law and working for his own account, Cross-defendant  
3 ROBERT YOUNG accepted employment by RAYBERN FOODS, INC. to represent  
4 it as its legal counsel in the negotiations between RAYBERN FOODS, INC. and  
5 ROSE AND SHORE, INC.  
6

7           10. At the time Cross-defendant ROBERT YOUNG accepted employment as  
8 attorney for RAYBERN FOODS, INC., he was fully aware that TRI was acting as a  
9 business broker for RAYBERN FOODS, INC. in the aforementioned negotiations.  
10

11           11. In undertaking to represent RAYBERN FOODS, INC. as its legal counsel,  
12 Cross-defendant ROBERT YOUNG did not seek nor was he granted permission to  
13 act in said capacity by TRI. At no time did YOUNG disclose to TRI that his  
14 representation of RAYBERN might result in a conflict of interest; nor did YOUNG  
15 ever obtain a waiver from TRI of any such potential conflict.  
16

17           12. Cross-defendant ROBERT YOUNG did not seek nor was he granted  
18 authority to act on behalf of TRI in connection with the services he undertook to  
19 provide for RAYBERN FOODS, INC. as its counsel.  
20

21           13. The activities of Cross-defendant ROBERT YOUNG as counsel for  
22 RAYBERN FOODS, INC. were not within the course or scope of his duties as  
23 officer, director, or legal counsel for TRI.  
24

1           14. In undertaking to represent RAYBERN FOODS, INC. as its legal counsel,  
2 Cross-defendant ROBERT YOUNG was acting for own account and for his sole  
3 benefit and not for any benefit to TRI.  
4

5           15. Defendant RAYBERN FOODS, INC. has filed a Cross-complaint against  
6 ROBERT YOUNG, TRI COMMERCIAL REAL ESTATE SERVICES, INC. and  
7 JOHN FULTS, alleging, inter alia, that Cross-defendant ROBERT YOUNG breached  
8 his fiduciary duty to RAYBERN FOODS, INC. by undertaking to act as its legal  
9 counsel without fully disclosing his relationship with TRI.  
10

11           16. If it is established that there was a breach of duty on the part of Cross-  
12 defendant ROBERT YOUNG to make a full disclosure to RAYBERN FOODS, INC.  
13 of his relationship with TRI or to obtain a fully informed waiver of potential conflict  
14 of interest and consent from RAYBERN FOODS, INC., said breach arose out of and  
15 was occasioned by the fact that Cross-defendant ROBERT YOUNG undertook to  
16 represent RAYBERN FOODS, INC. as its legal counsel without fulfilling obligations  
17 that arose directly out of that attorney/client relationship.  
18  
19

20           17. If there was a failure by Cross-defendant ROBERT YOUNG to make  
21 necessary disclosures or to obtain a fully informed waiver and consent from  
22 RAYBERN FOODS, INC., that failure was attributable solely to the acts undertaken  
23 by or omissions made by Cross-defendant ROBERT YOUNG in his capacity as an  
24 attorney at law acting as such for his own account.  
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1 18. In undertaking to represent RAYBERN FOODS, INC. as its legal counsel,  
2 Cross-defendant ROBERT YOUNG did not disclose to TRI the extent of his  
3 disclosures to RAYBERN FOODS, INC. such that TRI had no notice of any error or  
4 omission in connection therewith and no opportunity to address any such error or  
5 omission.  
6 omission.

7 19. In undertaking to represent RAYBERN FOODS, INC. as its legal counsel,  
8 Cross-defendant ROBERT YOUNG is solely responsible for the events which have  
9 resulted in the present claim against TRI.  
10 resulted in the present claim against TRI.

11 20. The aforementioned conduct by ROBERT YOUNG, if true, was adverse  
12 to TRI and proximately caused TRI to incur attorneys fees and costs in the defense of  
13 the Cross-complaint by RAYBERN FOODS, INC.  
14 the Cross-complaint by RAYBERN FOODS, INC.

15 21. If damages were sustained by RAYBERN FOODS, INC. as alleged in the  
16 Cross-complaint, these damages were caused, entirely or in part, by Cross-defendant  
17 ROBERT YOUNG, in that he was actively and primarily at fault, and not by any  
18 wrongdoing or by any actual fault on the part of Cross-complainants TRI  
19 COMMERCIAL REAL ESTATE SERVICES, INC. or JOHN FULTS.  
20 COMMERCIAL REAL ESTATE SERVICES, INC. or JOHN FULTS.

21 22. In undertaking to represent RAYBERN FOODS, INC. as its legal counsel,  
22 Cross-defendant ROBERT YOUNG placed his self-interest ahead of the interests of  
23 TRI.  
24 TRI.

1           23. The aforementioned conduct by Cross-defendant ROBERT YOUNG, if  
2 true, was in breach of his fiduciary duties to TRI and constitutes constructive fraud by  
3 said Cross-defendant.  
4

5           WHEREFORE, Cross-complainants pray judgment against Cross-defendant  
6 ROBERT YOUNG as hereinafter set forth.

7                                   **SECOND CAUSE OF ACTION**  
8                                   **(Legal Malpractice)**  
9                                   **(On behalf of TRI Only)**

10           24. Cross-complainant TRI realleges and incorporates by reference each and  
11 every allegation contained in the First Cause of Action as though fully set forth  
12 herein.  
13

14           25. Cross-complainant RAYBERN FOODS, INC. has alleged in its Cross-  
15 complaint, inter alia, that TRI was under a duty to make certain disclosures and/or to  
16 obtain a waiver of conflict of interest and consent from RAYBERN FOODS, INC.,  
17 all as more fully set forth therein. TRI has denied said allegations in the Answer to  
18 Cross-complaint filed on its behalf. However, if it should be established that such a  
19 duty did exist, then Cross-defendant ROBERT YOUNG, as legal counsel for TRI,  
20 was under a duty to properly advise TRI in connection with any potential conflict of  
21 interest and any duties or obligations arising therefrom.  
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24           26. Cross-defendant ROBERT YOUNG's failure to advise TRI of any duty or  
25 obligation arising from the retention of ROBERT YOUNG by RAYBERN FOODS,  
26

1 INC., if any such duty or obligation is established, constituted an error and omission  
2 committed within the course and scope of his duty to TRI as an attorney at law acting  
3 as legal counsel to TRI.  
4

5 27. Cross-complainant has been damaged by virtue of having to defend  
6 against the instant Cross-complaint and will suffer additional damage in the event it is  
7 determined that there was a breach of duty by TRI arising out of the retention of  
8 Cross-defendant ROBERT YOUNG by RAYBERN FOODS, INC. Cross-  
9 complainant will amend this Cross-complaint to allege said damages with certainty  
10 upon proof at trial.  
11

12 WHEREFORE, Cross-complainants pray judgment against Cross-defendant  
13 ROBERT YOUNG as hereinafter set forth.  
14

15 **THIRD CAUSE OF ACTION**  
16 **(Indemnity)**  
17 **(On behalf of TRI and JOHN FULTS)**

18 28. Cross-complainants reallege and incorporate by reference each and every  
19 allegation contained in the First Cause of Action as though fully set forth herein.

20 29. Cross-complainants are entitled to indemnification from cross-defendant  
21 ROBERT YOUNG for all legal costs and fees, including attorneys' fees, incurred in  
22 the defense of the Cross-complaint by RABYERN FOODS, INC. against TRI.  
23  
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1           30. Cross-complainant has made written demand for indemnification by  
2 Cross-defendant ROBERT YOUNG. Notwithstanding said demand, Cross-defendant  
3 ROBERT YOUNG has failed and refused to indemnify TRI.  
4

5           WHEREFORE, these cross-complainants pray for judgment against Cross-  
6 defendants as hereinafter set forth.

7                                   **FOURTH CAUSE OF ACTION**  
8                                   **(Contribution)**  
9                                   **(On behalf of TRI and JOHN FULTS)**

10          31. Cross-complainants reallege and incorporate by reference each and every  
11 allegation contained in the First Cause of Action as though fully set forth herein.

12          32. If Cross-complainants are found liable under the allegations contained in  
13 the Cross-complaint of RAYBERN FOODS, INC., which liability Cross-  
14 complainants specifically deny, Cross-complainants and Cross-defendant ROBERT  
15 YOUNG, and each of them, will be joint tortfeasors and there will exist a right of  
16 comparative equitable indemnity between and amongst them as joint tortfeasors,  
17 based on the principles enunciated in American Motorcycle Association v. Superior  
18 Court (1978) 20 Cal.d 570.  
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20           WHEREFORE, Cross-complainants pray judgment against Cross-defendant  
21 ROBERT YOUNG as hereinafter set forth.  
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**FIFTH CAUSE OF ACTION  
(Declaratory Relief)  
(On behalf of TRI and JOHN FULTS)**

33. Cross-complainants reallege and incorporate by reference each and every allegation contained in the First Cause of Action as though fully set forth herein.

34. An actual controversy has arisen and now exists between Cross-complainants TRI and JOHN FULTS and Cross-defendant ROBERT YOUNG in that said Cross-complainants contend, and Cross-defendant denies:

- a. that as between said Cross-complainants and Cross-defendant, responsibility, if any, for damages claimed by RAYBERN FOODS, INC., if any, rests entirely or partially on Cross-defendant ROBERT YOUNG.
- b. that, as a result, Cross-defendant ROBERT YOUNG is obligated to partially or fully indemnify Cross-complainants for any sums that Cross-complainants may be compelled to pay as the result of this action, together with Cross-complainants' costs, expenses and attorney's fees.

35. Cross-complainants desire a judicial determination of the respective rights and duties of Cross-complainants and Cross-defendant with respect to the damages claimed by RAYBERN FOODS, INC. In particular, Cross-complainants desire a declaration of the comparative liability of Cross-complainants and Cross-defendant

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1 for these damages, if any, and a declaration of Cross-defendant's responsibility for  
2 comparative indemnity to Cross-complainants for any sums that Cross-complainants  
3 may be compelled to pay and for which Cross-defendant ROBERT YOUNG is  
4 determined responsible, entirely or in part.  
5

6 36. Such a declaration is necessary and appropriate at this time in order that  
7 Cross-complainants may ascertain their rights and duties with respect to RAYBERN  
8 FOODS, INC.'s claim for damages. Furthermore, the claim of RAYBERN FOODS,  
9 INC. and the claim of Cross-complainants arise out of the same transaction, and  
10 determination of both in one proceeding is necessary and appropriate in order to  
11 avoid the multiplicity of actions that would result if Cross-complainants were  
12 required now to defend against the claim of RAYBERN FOODS, INC. and then bring  
13 a separate action against Cross-defendant ROBERT YOUNG for indemnification of  
14 sums that Cross-complainants may be compelled to pay as the result of any damages,  
15 judgment, or other awards recovered by RAYBERN FOODS, INC. against these  
16 Cross-complainants.  
17  
18  
19

20 WHEREFORE, Cross-complainants pray judgment against Cross-defendant  
21 ROBERT YOUNG as follows:  
22

23 **AS TO THE FIRST THROUGH FOURTH CAUSES OF ACTION**

- 24 1. For damages according to proof;  
25 2. For costs of suit herein incurred;  
26



1 3. For reasonable attorneys fees incurred in the defense of the Cross-  
2 complaint by RAYBERN FOODS, INC. against TRI; and  
3

4 4. For such other and further relief as the court may deem proper.

5 **AS TO THE FIFTH CAUSE OF ACTION**

6 1. For a judicial determination of the comparative fault of Cross-complainants  
7 and Cross-defendant ROBERT YOUNG for the damages claimed by RAYBERN  
8 FOODS, INC. if any are found to exist;  
9

10 2. For a declaration of the amount that Cross-defendant ROBERT YOUNG is  
11 obligated to indemnify Cross-complainants if Cross-complainants are compelled to  
12 pay any sum as the result of any damages, judgment, or other awards recovered by  
13 RAYBERN FOODS, INC. against these Cross-complainants;  
14


15 3. For costs of suit herein incurred;

16 4. For reasonable attorneys fees; and

17 5. For such other and further relief as the court may deem proper.  
18

19 Dated: September 13, 2005

20 ALBERT E. CORDOVA  
21 A Professional Law Corporation

22 By   
23 ALBERT E. CORDOVA  
24 Attorney for Cross-complainant  
25 TRI COMMERCIAL REAL ESTATE  
26 SERVICES, INC. and JOHN FULTS  
27

**PROOF OF SERVICE**

I am a citizen of the United States and employed in Marin County, State of California; I am over the age of eighteen (18) years of age and not a party to the within above-entitled action; my business address is: 1299 Fourth St., Suite 202, San Rafael, CA 94901. On September 13, 2005, I caused to be served the documents identified herein as follows:

**Documents Served: CROSS-COMPLAINT ON BEHALF OF TRI COMMERCIAL REAL ESTATE SERVICES, INC. AND JOHN FULTS AND AGAINST ROBERT YOUNG FOR BREACH OF FIDUCIARY DUTY, LEGAL MALPRACTICE, INDEMNITY, CONTRIBUTION AND DECLARATORY RELIEF**

Kyra A. Subbotin  
Law Offices of Kyra A. Subbotin  
2625 Alcatraz Avenue, No. 152  
Berkeley, CA 94705  
Telephone: (510) 923-0451  
Facsimile: (510) 923-0565

Clifford Horner  
Berding & Weill LLP  
3240 Stone Valley Road West  
Alamo, CA 94507-1558  
Telephone: (925) 838-2090  
Facsimile: (925) 820-5592

XXX (BY MAIL) I placed such envelope with postage thereon fully prepaid in the United States mail at San Rafael, California.

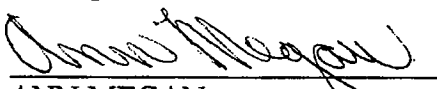
\_\_\_\_ (BY PERSONAL SERVICE) I caused said documents to be delivered to the above address.

\_\_\_\_ (VIA TELEFACSIMILE) I caused said document to be transmitted to the above addressee via telefacsimile.

XXX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

\_\_\_\_ (FEDERAL) I declare that I am employed at the office of a member of the bar of this court at whose direction the service was made.

Executed at San Rafael, California on September 13, 2005

  
ANN MEGAN

100

**LAW OFFICES OF ROBERT L. YOUNG**  
A Professional Corporation  
1777 Oakland Blvd., Suite 300  
Walnut Creek, California 94596

THIS WRITTEN FEE CONTRACT ("Contract") is entered into as of May 10, 2001, by and between RAYBERN FOODS, INC., a California Corporation, hereinafter referred to as "Client" and THE LAW OFFICES OF ROBERT L. YOUNG, a Professional Corporation, hereinafter referred to as "Attorneys." Client and Attorneys hereby agree to the following terms and conditions:

1. Scope of Agreement

Client hires Attorneys to provide legal services to Client in connection with a licensing transaction involving Rite-Way Meat Packers, Inc., Rose & Shore, Inc., RBR Meat Company, Inc. and eventually a separate agreement between Client and Togo's ("the Matter"). The representation of Client by Attorneys is anticipated to continue through the execution of a Definitive Agreement (the "Closing") and through execution of an agreement between Client and Togo's.

2. Duties of Attorneys and Client

Attorneys shall provide those non-litigation legal services reasonably required to represent Client in the Matter. Attorneys shall also take reasonable steps to keep Client informed of significant developments and to respond to Client's inquiries.

Client shall be truthful with Attorneys, cooperate with Attorneys, keep them informed of developments regarding the Matter and associated developments, perform the obligations Client has agreed to perform under this agreement, pay Attorneys' bills in a timely manner, and keep Attorneys apprised of Client's address, telephone number and whereabouts.

3. Fees/Retainer

Attorneys will charge by the hour at specified rates for time that legal personnel spend on Client's case. Attorneys' specified hourly rates for legal personnel are set forth on Schedule 1 attached hereto. Client agrees to pay for Attorneys' legal services at the specified rates.

*TABLE*  
Prior to the commencement of any services to be rendered by Attorneys in the above Matter, Client shall pay Attorneys the sum of FIVE THOUSAND AND NO/100 DOLLARS (\$5,000) as a deposit against Client's payment of Attorneys' fees and costs incurred on behalf of Client ("Retainer"). At any time the balance of the Retainer falls below ONE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$1,500), Attorneys shall have the right, as a pre-condition to the rendering of further services, to require Client to advance as an additional retainer such sums as Attorneys believe to be appropriate, but not more than the amount of the original Retainer. This right shall be an on-going right of Attorneys throughout Attorneys' representation of Client.

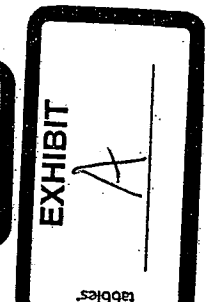
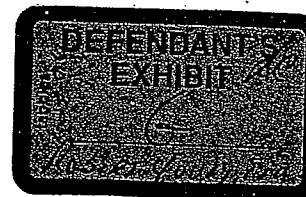
RY0117

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EXHIBIT 9

000392 YOUNG



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#### 4. Billing Practices

Attorneys bill in minimum units of .25 hours (15 minutes) for any task.

Attorneys will charge for all telephone calls relating to the Matter, including, but not limited to, calls with Client, counsel, consultants, experts and others. The legal personnel assigned to Client's case will confer among themselves about the case as required whether part of Attorneys' staff or counsel from another law firm. When they do confer, each such person will charge for the time expended. Likewise, if more than one Attorney's legal personnel attend a meeting, each will charge for his or her time. Attorneys will charge for any waiting time and travel time, both locally and out of town.

#### 5. Costs and Other Charges

(a) In General. Attorneys may incur various costs and expenses in performing legal services under this contract. Client agrees to pay for those costs and expenses in addition to the hourly charges for services rendered by legal personnel, and to provide payment for such costs in advance, as may be requested by Attorneys from time to time. Costs and expenses commonly incurred by Attorneys include filing fees and other charges assessed by public agencies, long distance telephone calls, electronic mail, messenger and other delivery fees, postage, photocopying and other reproduction charges, parking and mileage, charges for computer research and other outside assisted legal research, charges for computer time, word processing charges, investigation expenses, consultants' fees, facsimile transmissions, clerical staff overtime occasioned by Client emergencies, and other similar items. Except for the items listed on Schedule 2, all of the foregoing will be charged to Client at Attorneys' cost. Schedule 2 lists those items that will be billed other than at cost and the current rates. The rates on Schedule 2 are subject to change as provided in paragraph 6 of this contract.

(b) Travel. If out of town travel is required of Attorneys' legal personnel, Client agrees to pay all costs of such travel, in addition to the hourly rates for travel time.

(c) Attorneys shall itemize all costs incurred on each periodic statement.

(d) To aid Attorneys in representing Client in the Matter, it may be necessary to hire one or more experts or consultants. Client authorizes Attorneys to incur all reasonable costs and to hire any such expert or consultant reasonably necessary in Attorneys' judgment, as long as the estimate of such expense does not exceed TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500). Attorneys shall obtain Client's consent before retaining outside experts or consultants where the cost thereof is estimated to exceed TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500).

#### 6. Billing Statements

Attorneys shall send Client a statement for fees and costs incurred on a monthly basis. Client shall pay Attorneys' statements immediately upon presentation. Any statements not paid within said thirty (30) day period shall thereafter bear interest at the rate of ten percent (10%) per annum. Attorneys' statement shall indicate any initial Retainer balance due from Client, any credit balance of the Retainer, the amount charged against the Retainer, and all amounts then due and owing from Client to Attorney.

Attorneys' statements of attorneys' fees shall clearly state the basis thereof, including the amount, rate and basis for calculation (or other method of determination).

Attorneys shall provide Client with a statement within ten (10) days of request. Client is entitled to make subsequent requests for bills at intervals of no less than thirty (30) days following the initial request.

#### 7. Lien

Client hereby grants Attorneys a lien on the Matter for any sums due and owing by Client to Attorneys, specifically including any amount still owed by Client to Attorneys, at the conclusion or termination of Attorneys' services. The lien will attach to all purchase price monies or any other consideration or sums paid to Client or its successor as a result of the Closing or to assets of Client or its successor if the Matter does not close.

#### 8. Disclaimer of Guarantee; Conflict Disclosure

Attorneys have made no promises or guarantees to Client about the outcome of the Matter, and nothing in this contract shall be construed as such a promise or guarantee. Further, Client acknowledges that it has, with the help of JOHN FULTS of TRI COMMERCIAL REAL ESTATE SERVICES, INC. ("TRI"), its agent in the Matter, negotiated the basic economic terms and conditions of the Matter. Client further acknowledges that Attorneys have disclosed to it that Attorneys have represented TRI in the past and likely will again in the future, and that as such, a conflict of interest either does exist presently or may exist in the future; knowing this, Client has elected to waive any such conflict of interest.

#### 9. Discharge and Withdrawal

Client may discharge Attorneys at any time. Attorneys may withdraw only for good cause. Among the facts constituting good cause are Client's breach of this contract, including the failure to pay Attorneys' statements when due, and Client's refusal to cooperate with Attorneys or to follow their advice. Upon such a withdrawal, Attorneys agree to cooperate with any substitute counsel in assisting them to become familiar with the case. Attorneys and Client each agree to sign any documents reasonably necessary to complete Attorneys' discharge or withdrawal.

#### 10. Termination or Conclusion

Upon the termination or conclusion of Attorneys' services, all unpaid charges for services rendered and costs incurred or advanced through the termination or conclusion date shall become immediately due and payable. Attorneys acknowledge their obligation, upon Client's demand, to deliver Client's file to Client at or after the termination or conclusion of Attorney's services.

#### 11. Written Contract Required by Law

This document constitutes the written fee agreement between Attorneys and Client required by California Business and Professions Code Section 6148. Client shall be presumed to have agreed to all of the provisions set forth in this contract unless Client notifies Attorneys in writing of Client's objections within fifteen (15) days of the date of this contract.

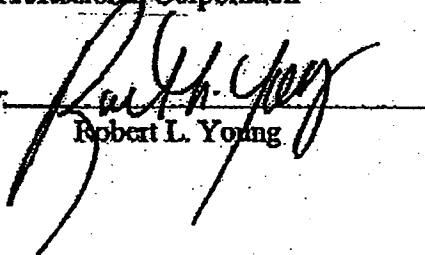
12. Commencement of Services

Attorneys shall have no obligations whatsoever to provide legal services to Client unless the initial Retainer is paid in good funds in accordance with the terms of this Contract, and this contract is signed by Client and delivered to Attorneys.

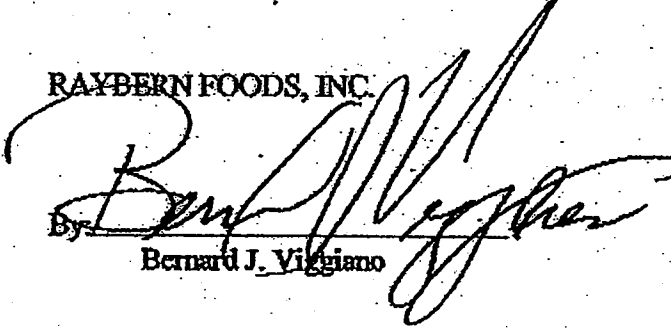
13. Personal Guarantee

The financial obligations of Client hereunder are hereby personally guaranteed by BERNARD J. VIGGIANO AND JAMIE VIGGIANO, husband and wife and the principal shareholders of Client ("Guarantors").

LAW OFFICES OF ROBERT L. YOUNG  
A Professional Corporation

By:   
Robert L. Young

RAYBERN FOODS, INC.

By:   
Bernard J. Viggiano

By: \_\_\_\_\_  
Jamie Viggiano

"Guarantors"

By: \_\_\_\_\_  
Bernard J. Viggiano

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Jamie Viggiano

Dated: \_\_\_\_\_

**SCHEDULE 1**

Specified hourly rates for legal personnel of Law Offices of Robert L. Young, a Professional Corporation, initially assigned to this matter are as follows:

Robert L. Young Attorney at Law	\$250.00/per hour
Other Lawyers Working on Attorneys Staff	\$250.00/per hour
Legal Assistants and Paralegals	\$100/per hour

**Schedule 2**

The expense or cost items below will be charged to Client initially at the indicated rates.

Photocopying

Waived

Mileage

Waived if not outside Alameda and Contra Costa County. This does not waive the right to reimbursement of travel costs as is otherwise provided for in the foregoing Agreement.

Facsimile

Waived



1 Daniel L. Rottinghaus, Esq., State Bar No. 131949  
Paul W. Windust, Esq., State Bar No. 167338

2 **BERDING & WEIL LLP**  
3240 Stone Valley Road West  
3 Alamo, California 94507  
Telephone: 925/838-2090  
4 Facsimile: 925/820-5592

5 Attorneys for Plaintiff  
Robert L. Young

7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA

10 ROBERT L. YOUNG,  
11 Plaintiff,

12 vs.

No. C07-05711 SBA

**PLAINTIFF ROBERT L. YOUNG'S  
RESPONSES TO ILLINOIS UNION  
INSURANCE COMPANY'S SPECIAL  
INTERROGATORIES**

13 ILLINOIS UNION INSURANCE  
COMPANY, ACE WESTCHESTER  
14 SPECIALTY GROUP, and DOES 1  
through 50, inclusive,

15 Defendants.  
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19 PROPOUNDING PARTY: Defendant ILLINOIS UNION INSURANCE COMPANY

20 RESPONDING PARTIES: Plaintiff ROBERT L. YOUNG

21 SET NUMBER: ONE

22 **PREAMBLE AND GENERAL OBJECTIONS**

23 It should be noted that this responding party has not fully completed its investigation of  
24 the facts relating to this case, has not completed discovery in this action and has not completed  
25 preparation for trial. All of the responses contained herein are based only upon such information  
26 and documents which are presently available to, and specifically known to this responding party,  
27 and disclose only those contentions which presently occur to it.

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1 It is anticipated that further discovery and further independent investigation will supply  
 2 additional facts, as well as to establish entirely new factual matters, all of which may lead to  
 3 substantial additions to, changes in, and variations from the contentions herein set forth.

4 The following responses are given without prejudice to responding party's right to  
 5 produce evidence of any subsequently discovered fact or facts which this responding party may  
 6 later recall or discover. Responding party accordingly reserves its right to change any and all of  
 7 its responses herein as additional facts are ascertained, analysis made, legal research completed,  
 8 and contentions formulated. However, for the purpose of making a good-faith effort to comply  
 9 with the spirit of discovery law, responding party serves herewith the following responses. Also,  
 10 objections herein are made on the advice of counsel in order to protect responding party from  
 11 unwarranted invasion of privacy, records and files. Responding party further generally objects to  
 12 the extent said requests seek information protected by the attorney-client privilege, attorney  
 13 work-product doctrine and rights of privacy and confidentiality and/or have no basis in law or  
 14 fact.

15 **SPECIAL INTERROGATORY NO. 1:**

16 Identify with particularity each Wrongful Act alleged against Plaintiff in the CLAIM  
 17 which did not arise out of, or result from or in any way involve Plaintiff's service as legal counsel  
 18 to Raybern Foods, Inc.

19 **RESPONSE TO SPECIAL INTERROGATORY NO. 1:**

20 Responding Party objects to this interrogatory in that it calls for a legal conclusion and  
 21 expert legal interpretation of the insurance policy. Responding Party further objects that this  
 22 interrogatory is vague and ambiguous as to the term "Plaintiff in the CLAIM." Further objection  
 23 is made pursuant to *Dusek v. United Airlines Inc.*, 9 FRD 326 (1949) in that the interrogatory  
 24 requires analysis of facts and goes beyond supplying facts within Responding Party's knowledge  
 25 or possession. Further objection is made pursuant to *IBP, Inc. v. Mercantile Bank of Topeka*, 179  
 26 FRD 316 (1998) in that the interrogatory is overly broad and burdensome. Subject to and  
 27 without waiving the above objection, Responding Party responds as follows:

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Responding Party refers Propounding Party to Raybern Foods, Inc.'s original Cross-Complaint and First Amended Cross-Complaint as well as the Cross-Complaint from TRI and Fults. Propounding Party owed Plaintiff a "right and duty to defend any Claim and such right and duty shall exist even if any of the allegations are groundless, false or fraudulent" pursuant to BMI20016061 ("Policy"), Section L. (2.), pg. GT&C-3. The Wrongful Acts include Employment Practices Coverage Section, (B.)(11.), "e) breach of an actual or implied employment contract," and/or "i) wrongful failure or refusal to adopt or enforce workplace or employment practices, policies or procedures," and/or "m) negligent hiring or negligent supervision of others in connection with a) through l) above..." (Policy, pg. EPL-2) Additionally, Directors and Officer and Company Coverage Section, (B.)(9.) "... any actual or alleged error, omission, misleading statement, neglect, breach of duty or act by: a) any of the Directors and Officers, while acting in their capacity as: (i) a director, officer or employee of the Company or the functional equivalent to a director or officer of the Company..." (Policy, D&O-2).

Discovery is continuing and Responding Party reserves the right to supplement or amend these Responses as necessary.

**SPECIAL INTERROGATORY NO. 2:**

IDENTIFY any changes between the original cross-complaint of Raybern Foods, Inc. asserted in the Claim and the First Amended Cross-Complaint therein which you contend impact coverage under the POLICY.

**RESPONSE TO SPECIAL INTERROGATORY NO. 2:**

Responding Party objects to this interrogatory in that it calls for a legal conclusion and expert legal interpretation of the insurance policy. Further objection is made pursuant to *Dusek v. United Airlines Inc.*, 9 FRD 326 (1949) in that the interrogatory requires analysis of facts and goes beyond supplying facts within Responding Party's knowledge or possession. Further objection is made pursuant to *Leonia Amusement Corp v. Loew's, Inc.*, 18 FRD 503 (1955) in that the interrogatory requires Responding Party to make a compilation of information where both the original Cross-Complaint and First Amended Cross-Complaint are in the possession of

1 the Propounding Party. Subject to and without waiving the above objection, Responding Party  
2 responds as follows:

3 Responding Party has provided both Raybern Foods, Inc.'s original Cross-Complaint and  
4 First Amended Cross-Complaint to Propounding Party for their own investigation, analysis and  
5 determination regarding the impacts on coverage. It is Propounding Party's duty to find  
6 coverage.

7 Discovery is continuing and Responding Party reserves the right to supplement or amend  
8 these Responses as necessary.

9 **SPECIAL INTERROGATORY NO. 3:**

10 State all facts upon which YOU base YOUR contention that the CLAIM is covered under  
11 the POLICY.

12 **RESPONSE TO SPECIAL INTERROGATORY NO. 3:**

13 Responding Party objects to this interrogatory in that it is vague and ambiguous as to the  
14 term "covered" and calls for a legal conclusion and expert legal interpretation of the insurance  
15 policy. Further objection is made pursuant to *Dusek v. United Airlines Inc.*, 9 FRD 326 (1949) in  
16 that the interrogatory requires analysis of facts and goes beyond supplying facts within  
17 Responding Party's knowledge or possession. Further objection is made pursuant to *Stovall v.*  
18 *Gulf & South American S.S. Co.*, 30 FRD 152 (1961) in that the interrogatory is too general and  
19 all-inclusive by its employment of the term "State all facts upon...". Further objection is made  
20 pursuant to *IBP, Inc. v. Mercantile Bank of Topeka*, 179 FRD 316 (1998) in that the interrogatory  
21 is overly broad and burdensome. Subject to and without waiving the above objection,  
22 Responding Party responds as follows:

23 Responding Party was sued by Raybern Foods, Inc. in Responding Party's capacity as a  
24 corporate officer and director of TRI Commercial Real Estate Services, Inc. ("TRI").  
25 Additionally, Responding Party was sued by TRI and John Fults ("Fults") in its Cross-Complaint  
26 in Responding Party's capacity as a corporate officer and director of TRI. The Cross-Complaints  
27 from Raybern Foods, Inc., TRI and Fults contain allegations against Responding Party of breach

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1 inquiry into the public documents filed with the court against Responding Party in the underlying  
2 matter.

3 Date: May 27, 2008

BERDING & WEIL LLP

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5 By: 

Daniel L. Rottinghaus  
Paul W. Windust  
Attorneys for Plaintiff  
Robert L. Young

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VERIFICATION TO FOLLOW

PROOF OF SERVICE

Case Name: *Young v. Illinois Union Insurance Co.*  
Case No: USDC, Northern District of California, Case No. C07-05711 SBA

I am employed in the County of Contra Costa, State of California. My business address is 3240 Stone Valley Road West, Alamo, California 94507. I am over the age of eighteen years, and not a party to the within action

On May 27, 2008, I served the within:

PLAINTIFF ROBERT I. YOUNG'S RESPONSES TO ILLINOIS UNION INSURANCE COMPANY'S SPECIAL INTERROGATORIES

on the party(ies) listed below, addressed as follows:

(SEE ATTACHED SERVICE LIST)

☐ **By Facsimile Transmission [C.C.P. § 1013; CRC 10081].** By causing a true copy thereof to be served by transmission from facsimile number (925) 820-5592 between the hours of 9:00 a.m. and 5:00 p.m., on the party(ies) at the facsimile telephone number(s) last provided by the party(ies) as stated on the attached service list. The transmission was reported as complete and without error, with a transmission report properly issued by the transmitting facsimile machine.

☒ **By First Class Mail/Ordinary Business Practices [C.C.P. §§ 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the United States Postal Service. Under the firm's practice, mail is deposited in the ordinary course of business with the United States Postal Service at Alamo, California, that same day, with postage thereon fully prepaid. I am aware that upon motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after the date of deposit for mailing.

☐ **By First Class Registered or Certified Mail/Return Receipt Requested/Ordinary Business Practices [C.C.P. §§ 1013, 1013a, 1020].** By causing a true copy thereof to be enclosed in a sealed envelope or package, registration or certification and return receipt requested, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of envelopes and packages for mailing with the United States Postal Service. Under the firm's practice, registered and certified first class mail with return receipt requested is deposited in the ordinary course of business with the United States Postal Service at Alamo, California, that same day, with all postage and fees thereon fully prepaid. I am aware that upon motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after the date of deposit for mailing.

☐ **By Express Mail [C.C.P. §§ 1013, 1013a].** By causing a true copy thereof to be enclosed in a sealed envelope or package, with Express Mail postage paid, addressed to the party[ies] as stated on the attached service list. I am readily familiar with the firm's business practice for collection and processing of Express Mail to be deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility maintained by the United States Postal Service for receipt of Express Mail. Under the

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1 firm's practice, Express Mail is deposited in the ordinary course of business with the  
 2 United States Postal Service at Alamo, California, that same day. I am aware that upon  
 3 motion of the party served, service is presumed invalid if postal cancellation date or  
 postage meter date on the envelope or package is more than one day after the date of  
 deposit for mailing.



**By Overnight Delivery [C.C.P. § 1013, 1013a].** By causing a true copy thereof to be  
 5 enclosed in a sealed envelope or package designated by the express service carrier,  
 6 with all delivery fees paid or provided for, addressed to the party[ies] as stated on the  
 attached service list. I am readily familiar with the firm's business practice for  
 7 collection and processing of overnight deliveries for deposit in a box or other facility  
 regularly maintained by the express service carrier, or delivered to an authorized  
 8 courier or driver authorized by the express service carrier to receive documents. Under  
 the firm's practice, overnight deliveries are deposited in the ordinary course of  
 business with the express service carrier at Alamo, California, that same day.



**By Personal Service [C.C.P. § 1011].** By causing a true copy thereof to be placed in a  
 10 sealed envelope or package addressed to the party[ies] as stated on the attached mailing  
 list.

11  
 12 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
 true and correct. Executed February 26, 2008, at Alamo, California.

13  
 14 By: \_\_\_\_\_

Michele Poloka

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**SERVICE LIST**

**Case Name:** *Young v. Illinois Union Insurance Co.*  
**Case No:** USDC, Northern District of California, Case No. C07-05711 MEJ

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Herbert P. Kunowski, Esq.  
Darren Le Montree, Esq.  
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Los Angeles, CA 90071  
Tel: (213) 443-5100  
Fax: (213) 443-5101

Attorneys for Defendant,  
ILLINOIS UNION INSURANCE  
COMPANY dba ACE WESTCHESTER  
SPECIALTY CLAIMS

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**PROOF OF SERVICE****STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California, by WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER and am over the age of 18 and not a party to the within action. My business address is 555 South Flower Street, Suite 2900, Los Angeles, California 90071.

On **July 22, 2008**, I served the foregoing document described as **DECLARATION OF CUSTODIAN OF RECORDS OF ILLINOIS UNION INSURANCE COMPANY** on all interested parties, through their respective attorneys of record in this action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel L. Rottinghaus, Esq.  
Paul W. Windust, Esq.  
Berding & Weil LLP  
3240 Stone Valley Road West  
Alamo, CA 94507

Attorneys for Plaintiff: ROBERT L. YOUNG  
Phone: (925) 838-2090  
Fax: (925) 820-5592

**XX** (**BY MAIL**) I caused such envelope(s) fully prepaid to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence or mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

       (**BY PERSONAL SERVICE**) I caused such envelope(s) to be delivered by hand to the offices of the addressee(s).

**XX** (**BY E-MAIL**) I caused such document to be served via E-mail at Paul W. Windust [pwindust@berding-weil.com]

**JURISDICTION**

**XX** (State) I declare under penalty of perjury that the above is true and correct.

Executed on **July 22, 2008**, at Los Angeles, California.

  
Irene Guzman-Buelna